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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES B. BRISTOW,

Petitioner,

v.

THE DAILY PRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Petitioner, James B. Bristow, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 22, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a finding of an employer's subjective intent to bring about an employee's resignation by imposing unreasonable employment conditions is a necessary element of the constructive discharge doctrine.

2. Whether the Court of Appeals applied the correct standard of review to the trial court's determination of defendant's motion j.n.o.v.

3. Whether harmful procedural error occurred when the Court of Appeals held that the court below should have granted defendant's motion j.n.o.v., where the motion was made on grounds not relied on in defendant's motion for a directed verdict.

PARTIES TO THE PROCEEDING

James B. Bristow, Petitioner

The Daily Press, Inc., Respondent

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Rule 52(a), Federal Rules of Civil Procedure

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit was published at 770 F.2d 1251 (4th Cir. 1985). The decision of the District Court for the Eastern District of Virginia, Richmond Division, was not published.

JURISDICTION AND DATE OF JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 22, 1985. The Fourth Circuit Court of Appeals had jurisdiction to review the judgment entered in the United States District Court for the Eastern District of Virginia, Richmond Division, pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., are set forth in the Appendix.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Plaintiff, James B. Bristow, filed an action under the Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C. Section 621, et seq., (ADEA), claiming that the defendant, The Daily Press, Inc. (The Daily Press), discriminated against Bristow on various grounds, i.e., failing to promote him to better paying jobs for which he had previously applied and for which he was also qualified, and further claiming that his request for retirement, although appearing to be voluntary, was actually forced, and therefore, that he was constructively discharged from the employ of The Daily Press due to the intolerable and unsatisfactory working conditions deliberately fostered by The Daily Press.

The case was tried before a jury and the Honorable J. Calvitt Clarke, Jr., United States District Judge, commencing April 4, 1984, and ending on Friday, April 6, 1984, with a favorable jury verdict.

Order for judgment permitted Bristow to recover from The Daily Press the sum of $149,000.00, together with interest and costs of the action, and it was entered on April 13, 1984.

A Notice of Motion for an Award of Attorney's Fees and Costs, together with supporting Memorandum and Affidavits of counsel was filed on April 17, 1984.

Defendant filed a Motion for Judgment notwithstanding the verdict and in the alternative, for a remittitur and/or a new trial on April 23, 1984.

A hearing on all post-trial motions was held on Friday, June 22, 1984. The District

Court rendered its opinion on August 23, 1984, on these matters; a Memorandum Opinion was filed and an Order entered denying all of The Daily Press' post-trial motions and awarding Bristow a small fraction of the attorneys' fees and costs he had requested.

Timely cross-appeals were filed by the parties to the Circuit Court of Appeals for the Fourth Circuit. The Fourth Circuit entered its judgment on August 22, 1985, reversing the judgment entered in the District Court.

On September 6, 1985, petitioner filed a motion to enlarge the time in which to file a Petition for Rehearing en banc of the Fourth Circuit decision and a Petition for a Rehearing en banc. On October 29, 1985, the motion to enlarge the time in which to file a Petition for Rehearing en banc was granted, and the suggestion for a Rehearing en banc was denied.

B. STATEMENT OF FACTS

Plaintiff James B. Bristow was employed by The Daily Press, Inc., from February, 1965 until September, 1981. Bristow testified that in 1980 he had various conversations with John Goodwyn, the director of the circulation department, regarding an upcoming vacancy as assistant circulation director and a later vacancy as single copy sales manager. Bristow testified that he had been led to believe that at least one of these positions would be his until John Goodwyn told him that the assistant's job had been filled by hiring a young man and that he was looking for a young man to take over the single copy sales project. Goodwyn told Bristow that he would not consider Bristow for the single copy sales position except in an emergency because

of Bristow's age. Born in 1917, Bristow was 64 years of age when this conversation took place.

Shortly thereafter, Bristow testified that he was offered his choice of two positions: assistant to the single copy sales manager, or swing man. Bristow chose to work as a swing man. He served as a swing man for only a short period of time, however, because after he was passed over for a promotion for which he actually did apply, he was abruptly transferred to District 25 which was known throughout the circulation department as a problem district, not because of problems unique to the district but because of the district's unique geography and demographics. H. Nelson Salway,

Bristow's predecessor in District 25, testified that as a result of the workload in the district, he suffered a nervous breakdown. Reflecting on the manner in which he had been treated, Bristow testified he was afraid to make any comments regarding his new assignment. Upon assuming his duties in District 25, Bristow was given none of the documentation normally supplied to a newly-assigned district manager, such as a carrier route audit. The purpose of the route audit is to establish how many paid subscribers each carrier has, to ensure that each carrier is receiving the proper number of papers. Without such documentation, carriers might be receiving too many papers for which they are charged, resulting in collection shortages. Bristow further testi-

fied that when he took over the district it was beset with many problems, but within a month he was able to stabilize the problems without receiving any support from his supervisor. Despite management's contention that Bristow was ineffective, Robert H. Gray, Bristow's successor in District 25, testified that when he took over the district, there were only minor problems which could have been corrected if Bristow's supervisor had supported Bristow.

Bristow also testified that the circulation department devised a contest to increase paid circulation but did not include an automatic cutoff date. When the contest period ended, carriers continued to receive and be billed for papers customers did not

want, despite carriers' calls to the circulation department requesting fewer papers. As a result, carriers refused to pay for the overages, resulting in an outstanding balance in District 25 of $561.34. A meeting was called to discuss the problem with Bristow. Prior to the September 9 meeting, Bristow testified that he was told by Jean Burdick, his supervisor, that the purpose of the meeting was to criticize Bristow's performance in an attempt to force him into early retirement. A memorandum of the meeting was prepared, and Bristow indicated that the memorandum was accurate as to what it included, but that it failed to include any mention of the demand that he pay one-half of the outstanding balance, an amount equal to more than Bristow's weekly gross pay.

Bristow, having been told prior to the meeting that management would attempt to force his retirement, agreed to pay in order to keep his job. Immediately following the meeting, he spoke with Jean Burdick. Bristow testified, "Mr. Cruey had called her in there (Burdick) to "fire her -- fire me -- had called me to the meeting to fire me." The Fourth Circuit seized upon Bristow's testimonial slip, and during the course of their independent review of the testimony, arrived at the conclusion that the purpose of the meeting had been to fire Burdick. This conclusion is totally unsupported by the record. At the very least, Bristow's testimony was susceptible to two interpretations and, therefore, demonstrates that

Court's faulty application of the "clearly erroneous" standard of review.

After agreeing to pay, Bristow sought to avoid doing so for several days, reflecting on the fact that management acknowledged that the outstanding balances were the result of circulation department errors beyond his control. After several days, Burdick approached Bristow and let it be known, in no uncertain terms, that management expected payment immediately. Bristow wrote out a personal check.

The following day, without consulting his family and despite his often expressed intention to work until age 70, Bristow wrote out a letter of resignation. A week later he told his family and then sought to take back his resignation. Management, of course,

refused to take Bristow back, although at that point in time the resignation could have been rescinded. Once again, the Fourth Circuit opinion concludes simply that defendant had no obligation to take Bristow back after he submitted his resignation. Once again, the jury and the trial court could have reasonably inferred that the defendant, having forced Bristow's resignation, was not about to take him back.

Similarly, the Fourth Circuit refused to consider any testimony or documentation tending to support Bristow's claims regarding promotions because the jury verdict was against Bristow on the promotion issue. From the testimony at trial, which included an admission that Bristow did not actually apply

for certain positions and that certain positions were never created, the jury could have reasonably inferred that management sought to build Bristow up and then let him down, hoping he would resign. When that course of conduct failed to produce Bristow's resignation, he was abruptly transferred into a new position, denied the support of his supervisor and documentation which would protect him financially. Finally, he was given an ultimatum: he was to pay for errors acknowledged to be those of others. Moreover, all during this period, he was being told by his supervisor that he was too old and that management wanted him out. This verbal harassment continued even after Bristow submitted his resignation.

In this case, the jury was correctly

charged as to the elements of a constructive discharge, and from the testimony, the jury could have not only inferred management's intent to discriminate but also a pattern of discrimination directed against Bristow which made his working conditions unreasonable. Furthermore, the trial court reviewed the evidence before ruling on defendant's motion j.n.o.v., and it too found substantial evidence to support the jury verdict.

REASONS FOR GRANTING THE WRIT

Although the application of the constructive discharge doctrine in employment cases is well established, there exists a divergence of opinion among the Circuit Courts of Appeal which have addressed the issue as to the elements which must be demonstrated to prevail on a constructive discharge claim and the actions of an employer, unlawful or otherwise, which, as a matter of law, are unreasonable.

The constructive discharge doctrine was first developed in National Labor Relations Act litigation, NLRB v. Tricor Products, Inc., 636 F.2d 266, 271 (10th Cir. 1980); J. P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490, 494-5 (4th Cir. 1972); NLRB v. Century

Broadcasting Corp., 419 F.2d 771 (8th Cir. 1969); Bausch & Lomb Optical Co. v. NLRB, 217 F.2d 575, 577 (2nd Cir. 1954); NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243 (1st Cir. 1953).

Moreover, the doctrine has been applied in Title VII litigation. Goss v. Exxon Office Systems Co., 747 F.2d 885 (3rd Cir. 1984); Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2nd Cir. 1983); Irving v. Dubuque Packing Co., 689 F.2d 170, 173-74 (10th Cir. 1982); Nolan v. Cleland, 686 F.2d 806, 812-15 (9th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1981); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977); Jacobs v. Martin Sweets Co., Inc., 550

F.2d 364, 369 (6th Cir.), cert. denied, 431 U.S. 917, 97 S. Ct. 2180, 53 L.Ed.2d 227 (1977); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.), cert. denied, 423 U.S.825, 96 S. Ct. 39, 46 L.Ed.2d.41 (1975).

Since most of the operative, substantive language of the ADEA was drawn from Title VII, courts have, as a general proposition, indicated that Title VII and ADEA litigation should follow a parallel course, e.g., Loeb v. Textron, Inc.,600 F.2d 1003, 1004-16 (1st Cir. 1979).

In this case, the Fourth Circuit Court of Appeals, relying on its prior decisions, applied the more stringent test which requires a party claiming to have been a victim

of a constructive discharge to prove that the employer engaged in an intentional course of conduct calculated to provoke the employee's resignation; and that the working conditions imposed by the employer were so unpleasant or difficult that a reasonable person in the employee's shoes would resign.

The Fourth Circuit is not alone in imposing the two-prong test. Both the Eighth Circuit in Johnson v. Bunny Bread Co., 646 F.2d 1250, and the Tenth Circuit in Muller v. United States Steel Co., 509 F.2d 923 require an employee to demonstrate an employer's intent as well as unreasonable working conditions.

The majority of Circuits which have addressed the issue, however, have refused to require a plaintiff to demonstrate the

subjective intent of the employer, and have instead adopted an objective standard "requiring no more than a finding that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3rd Cir. 1984). See also: Alicea Rosado v. Garcia Santiago, supra; Bourque v. Powell Electrical Mfg. Co., supra; Jacobs v. Martin Sweets Co., Inc., 550 F.2d 364, 369 (6th Cir.), cert. denied, 431 U.S. 917, 97 S. Ct. 2180, 53 L.Ed.2d 227 (1977). Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981); Clark v. Marsh, 665 F.2d 116 (D.C. Cir. 1981); Hensen

v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982).

In addition, District Courts in the Second and Seventh Circuits have followed the majority of the Circuits in applying a reasonable person standard to constructive discharge cases. Orshan v. Macchiarola, 570 F.Supp. 620, 625 (E.D.N.Y. 1983); Bailey v. Binyon, 583 F.Supp. 923 (N.D.Ill., E.D. 1984).

A uniform application of the constructive discharge doctrine is frustrated by the similarity of the language used to define the doctrine by the various Circuits without regard for the test applied in the particular Circuit. In this case, the Fourth Circuit cited Young v. Southwestern Savings & Loan Assoc., 509 F.2d 140 (5th Cir. 1975) for the

proposition that a plaintiff claiming a constructive discharge must demonstrate the deliberate nature of the employer's action.

In Bourque v. Powell Electrical Mfg. Co., 617 F.2d at 65, however, the Fifth Circuit rearticulated the Young standard for determining whether an employee has been constructively discharged and acknowledged some authority for the proposition that for the imposition of intolerable working conditions to constitute a constructive discharge, it must be done with the purpose of forcing the employee to resign. The Court nevertheless rejected a test which would require devining an employer's intent, stating, "...such a rule is inconsistent with authority in this Circuit and, we believe, with the realities of modern employment."

Id. at 65. Rather, the Court made it clear that it was adopting the reasonable person standard. See also: Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525 (11th Cir. 1985), wherein the Court quotes the general rule regarding the deliberate actions of the employer but then cites Bourque, supra, which clarifies that Circuit's holding in Young and adopts the "reasonable person" test for a constructive discharge.

It is not surprising that the majority of courts have adopted a "reasonable person" standard for determining whether there has been a constructive discharge. As the court in Bourque noted, imposition of the more stringent test is inconsistent with "the realities of modern employment." 617 F.2d at

65. Discipline and discrimination can be so unpleasant as to amount to constructive discharge...that can be the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure. 119 Cong Rec. 30374, quoted in Lojek v. Thomas, 716 F.2d 675, 681 (9th Cir. 1983). Just what employee actions are reasonable, however, is open to debate.

There exists a schism, however, among the Circuits as to what actions of an employer will give rise to a constructive discharge regardless of the test employed by a particular Circuit. Thus, for example, the fact that a female employee is the victim of a form of gender-based discrimination may or may not constitute a constructive discharge.

Compare: Bourque v. Powell Electrical Mfg. Co., 617 F.2d at 66 (female employee receiving less pay for performing same task as male employee does not constitute a constructive discharge) with Goss v. Exxon Office Systems Co., 747 F.2d at 889 (constructive discharge found where defendant transferred female employee from a lucrative sales territory in favor of male employee). Further, a pattern of discriminatory treatment over time may or may not give rise to a constructive discharge. Compare the result in Noland v. Cleland, 686 F.2d at 813-814 (summary judgment reversed where plaintiff was denied necessary evaluations and subsequently given an inaccurate evaluation and assigned to a position which plaintiff had

not requested and ordinarily only assigned to a person requesting the assignment) with the result in this case, even though Bristow was subjected to various forms of discriminatory treatment including: references to his age in the context that he was too old and should consider retirement; an abrupt transfer, described to him by his supervisor as his final assignment, from a position which he had only a short time before been allowed to select; and upon his reassignment, the denial of routine documentation provided new district managers such as route audits; a demand that he reimburse his employers due to carrier shortages an amount equal to more than his weekly salary where the errors were acknowleged to be the fault of other departments over which he had no control; and

finally, direct word from his supervisor that he was to be terminated.

Moreover, since what a reasonable person would or would not do under certain circumstances is, of course, a question of fact, the issue of whether a constructive discharge has occurred should generally be up to the trier of fact. Nevertheless, as in other areas of the law, the circumstances may be such that a person's actions can be found to be unreasonable as a matter of law. Bailey v. Binyon, 583 F.Supp. 923, 929 (N.D.Ill., E.D. 1984). Despite the standard of review to be applied by appellate courts, however, the circuits, without regard for the constructive discharge test applied in a particular circuit, have disregarded the

findings below and have engaged in their own de novo fact-finding process.

In this case, defendant appealed from the memorandum opinion filed by the the trial court following oral argument on defendant's motion for judgment notwithstanding the verdict.* In ruling on a motion j.n.o.v., the court must consider "the record as a whole and in the light most favorable to the party

*Pursuant to R. 50(b) of the Federal Rules of Civil Procedure, a party may not move for a j.n.o.v. on a ground not stated in a motion for a directed verdict. Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3rd Cir. 1984). In this case, counsel for defendant twice moved for a directed verdict on grounds that Bristow failed to establish a prima facie case that age had been a factor in any of the jobs considered or applied for by the plaintiff. The trial court denied both motions. Defendant then moved for a j.n.o.v., asserting Bristow's failure to establish a constructive discharge, a ground not set forth in defendant's motion for a directed verdict.

opposed to the motion." See Wyatt v. Interstate Ocean Transport Company, 623 F.2d 888, 891 (4th Cir. 1980).

In reviewing the evidence in its entirety, the trial court judge, who presided at the trial and had the opportunity to observe the demeanor of the witnesses and listen to their testimony, found sufficient evidence of discriminatory practices against Bristow, to support the jury verdict in favor of Bristow.

The Court of Appeals, however, disregarded the standard of review to be applied to findings of the district judge, despite the clearly erroneous standard set forth in R. 52(a) of the Federal Rules of Civil Procedure and engaged in its own fact-

finding process. As a result of their review, the Fourth Circuit held that the motion notwithstanding the verdict should have been granted and reversed the judgment. Where evidence is susceptible to two interpretations, one supporting the verdict and one not supporting the outcome, a j.n.o.v. should be denied. Anderson v. City of Bessemer City, N.C., 470 U.S. __, 106 S.Ct. 1504, 884 L.Ed.2d 518 (1985).

The time is ripe for a ruling by this Court as to whether proof of an employer's intent to discriminate is a necessary element of a constructive discharge claim where the trier of fact has found that the complainant has been subjected to unreasonable employment conditons. Moreover, the time is ripe for

this Court to give guidance to the Circuit Courts of Appeals as to the types of employment conditions which will give rise to a constructive discharge claim and as to the proper standard of review to be applied when reviewing a District Court verdict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December, 1985.

APP 1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2021(L)

JAMES B. BRISTOW, Appellee,

versus

THE DAILY PRESS, INC., Appellant.

No. 84-2039

JAMES B. BRISTOW, Appellant,

versus

THE DAILY PRESS, INC., Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. J. Calvitt Clarke, District Judge. (C/A 83-193).

Argued: May 9, 1985
Decided: August 22, 1985

Before RUSSELL and WILKINSON, Circuit Judges, and KNAPP, Senior United States District Judge for the Southern District of West Virginia, sitting by designation.

John P. Connors, William J. Butler, Jr., Hanson, O'Brien, Birney & Butler for Appellant/Cross-appellee; Bernard J. DiMuro, Charles M. Rust-Tierney, Hirschkop & Grad, P.C.; Frederick E. Popovitch, William H. McKinnon, Popovitch & Popovitch, on brief for Appellee/Cross-appellant.

WILKINSON, Circuit Judge:

This appeal presents a question of constructive discharge in the law of employment discrimination. Plaintiff James B. Bristow brought suit against his former employer, The Daily Press, Inc., under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1982) et seq., complaining that he had been denied promotions and forced to resign because of his age. The case was tried before a jury, which found for the employer on the promotion denial claims, and for Bristow on the constructive discharge claim, awarding plaintiff $99,000 in damages for lost wages and $50,000 in liquidated damages. Judgment was entered accordingly, the district court also allowing attorneys' fees of $8,825 and costs of $1,500 for plaintiff. Defendant's motion for judgment n.o.v. on the constructive discharge claim was denied.

We reverse. While we are mindful of the deference due a jury verdict, after reviewing the evidence, we are convinced that defendant's motion for judgment n.o.v. should have been granted. Plaintiff demonstrated little more than job dissatisfaction which will not support a constructive discharge claim.

I

Bristow worked as a district manager for The Daily Press, Inc., from 1965 until his resignation in September, 1981 at the age of 64.[1] A district manager oversees carriers that distribute newspapers to customers and collects the bills when due. On October 15, 1980, Bristow was assigned to manage Dictrict 25, located in the city of Hampton, Virginia. This was an unusually large district, some 27 miles in circumference, containing a cross-section of customers, from the prominent to the poor. It included two low income areas.

[1] Bristow's personnel records, introduced into evidence by plaintiff, showed that he was born on April 17, 1917. Consistent with this, his complaint alleged that he was 61 when the first promotion denial claim arose in February, 1979, and Bristow testified that he was 66 when this case was tried on April 4-6, 1984. The district court's assumption, in ruling on defendant's post-trial motions, that Bristow was 62 years of age when he left defendant's employ, lacks evidentiary support.

Bristow had 57 carriers under his supervision, 55 of whom handled home delivery, while two had motor routes. He collected about $2,000 per week. Above Bristow in authority were John Goodwyn, the circulation director; Daniel Cruey, the assistant circulation director; and Jean Burdick, the division manager who was Bristow's immediate supervisor. Goodwyn and Bristow, as both testified, had a "very good" relationship.

Cruey told Bristow, upon placing him in charge of District 25, that this would be his "final assignment." Previously Bristow had been a "swing man," a substitute district manager assigned to various districts as needed. Bristow, however, suspected that management also wanted him "out" because he was too old, and that he was being sent to a district with unique problems. Bristow did encounter a number of difficulties in

managing District 25, including poor collections in the two low income areas, turnover of carriers on certain routes, fluctuating costs for the rural motor routes, and lack of financial documentation. Burdick helped him less than he desired.

None of the evidence offered, however, indicated that District 25's problems were in any way unique. Nelson Salway, a witness for plaintiff and his predecessor as manager of District 25, had experienced similar difficulties with collections, carrier turnover, motor routes and circulation overruns, but did not regard them as unusual. He observed that there "were problems with every district," compounded in District 25 simply due to its greater size. All district managers, according to Salway, confronted difficulties of the same nature. Other witnesses familiar with the tasks of a district manager corroborated Salway's

description. Robert Grey, Bristow's successor in District 25 and another witness called by plaintiff, described the problems in District 25 as "minor" and attributed them to improper management, believing that greater cooperation between Burdick and Bristow was needed. District 25, he asserted, was not a "problem" district but simply very large. Grey considered the district as "basically in pretty good shape," remarking that "[a]nybody that really had any knowledge of circulation work could have gone in and made the changes that I did." William Rogers, a manager of another district, recognized that all districts had problems like those in District 25. Bristow himself acknowledged that his troubles in District 25 diminished after he had been in charge for three to four weeks. By then he felt that he was "accomplishing something," having managed to "stabilize" his territory.

Bristow was principally criticized by superiors over his financial accountability. Circulation overruns arose when carriers failed to notify the company of how many newspapers they needed; this was a familiar problem, and as Salway remarked, "everyone complained about that." The company held its district managers responsible when carriers did not pay their outstanding accounts, though Bristow believed that he was not responsible for the carriers' circulation problems. Bristow admitted that he also co-mingled company and personal funds, but regarded the company at fault for not giving him sufficient change to handle collections.

Bristow's district was audited on August 1, 1981, and he was blamed for several outstanding accounts. He learned from Burdick on September 5 that there was "talk"

of forcing him into "early retirement."[2] On September 9, Bristow was called to a meeting with Goodwyn, Cruey and Burdick, and presented with a list of uncollected accounts totaling $561.34. Although Bristow's job performance was discussed by his superiors, no one threatened to fire him, nor did he offer to resign. Cruey proposed, rather, that Bristow pay half of the outstanding accounts, while the company would write off the remainder. Bristow accepted this arrangement, and shortly thereafter paid the company $281.17, believing it necessary to avoid being fired. He still did not consider himself responsible for the carriers' mistakes.

[2] Cruey sent a memorandum to Goodwyn on September 2 describing Bristow as a "liability" to the company due to his failure to carry out his responsibilities and his lack of organization, and suggesting Bristow's termination.

No evidence indicated that the employer would have taken any further action against Bristow. Both Bristow and Burdick had contended, in the course of the meeting, that the district was too large for one person to handle efficiently. Cruey noted this point in his record of the discussion. Goodwyn, summarizing the outcome in a September 9 memorandum, did not fault Bristow, but instead criticized Burdick's supervision of District 25. Nevertheless, following the meeting Bristow concluded that he was being "ganged up on and forced out" because of his age, and he decided to resign.[3] He presented

[3] Bristow had no other discussions with Goodwyn or Cruey before submitting his resignation. After the meeting, however, he spoke to Burdick, who told him that "Mr. Cruey had called her in there to fire her -- fire me. Had called me to the meeting to fire me." Bristow observed that Burdick "was right upset about it." Though Bristow may have interpreted Burdick's statement as referring to himself, it is obvious that the threat was directed at Burdick, both in light of her condition and Goodwyn's criticisms; indeed, it appears that Bristow's testimony was quoting Burdick's actual complaint verbatim.

a letter to Goodwyn and to William Van Buren, president of The Daily Press, on September 10, stating that he was resigning for "personal" reasons, effective at the end of the month. According to Bristow, Goodwyn asked, "Is this necessary?", and Bristow rejoined, "Yes, I think it is."

Later, on September 16, Bristow approached Goodwyn and Van Buren in an unsuccessful attempt to rescind his resignation. In discussions after Bristow submitted his retirement request, Burdick encouraged him not to reconsider in light of his age. Bristow once again spoke to Goodwyn on September 21, but now was concerned only that he would lose some retirement benefits because he was retiring before age 65. Goodwyn contacted Van Buren about the matter, and on September 30, Van Buren notified Bristow that his retirement benefits would be

supplemented by an additional $15.03 per month, so as to put him in the same position as if he had retired normally. Bristow's retirement became effective on October 1, 1981.

II

An employee must have been discharged to state an ADEA claim arising from loss of his job. 29 U.S.C. § 623(a) (1). The law affords no protection from discrimination unless there has been some adverse employment action by the employer. Because Bristow was not actually discharged, he relies here on a theory of constructive discharge. This claim is not supported by the evidence. The fact that problems and tensions are encountered on the job does not suffice to establish constructive discharge. Here those problems were part and parcel of what one would expect in a position in newspaper circulation and bill collection.

A constructive discharge occurs when "an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984), cert. denied, _____ U.S._____, 105 S.Ct. 1395 (1985) (Title VII), quoting J. P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (labor). Accord, Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Young v. Southwestern Savings & Loan Assn., 509 F.2d 140, 144 (5th Cir. 1975); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.), cert. denied, 423 U.S. 825 (1975). A plaintiff alleging constructive discharge must therefore prove two elements: deliberateness of the employer's action, and intolerability of the working conditions.

Deliberateness exists only if the actions complained of "were intended by the employer as an effort to force the employee to quit." EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir. 1983), rev'd on other grounds, _____ U.S. _____, 104 S.Ct. 2794 (1984). "To act deliberately, of course, requires intent." Holsey, 743 F.2d at 209. Our decisions require proof of the employer's specific intent to force an employee to leave, J. P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972). Intent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions, as we stated in Holsey, 743 F.2d. at 209. Where, however, all employees are treated identically, no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign. Johnson, 646 F.2d at 1256.

Intolerability of working conditions, as the circuits uniformly recognize, is assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. Goss, 747 F.2d at 888; Pena, 702 F.2d at 325; Clark, 665 F.2d at 1173; Johnson, 646 F.2d at 1256; Bourque, 617 F.2d at 65; Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977). "An employee may not be unreasonably sensitive to his working environment." Johnson, 646 F.2d at 1256. Thus, the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge. Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his

co-workers. He is not, however, guaranteed a working environment free of stress. The employment discrimination laws require as an absolute precondition to suit that some adverse employment actions have occurred. They cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting.

Even construing the evidence in the light most favorable to the nonmoving party, as we are required to do in reviewing a jury verdict on a motion for judgment n.o.v., Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980), the constructive discharge test was not satisfied here. For judgment n.o.v. to be denied, there had to exist "substantial evidence" upon which a jury could reasonably return a verdict for Bristow. Wyatt, 623 F.2d at 891. We are convinced that such evidence is lacking.

At most, Bristow demonstrated that he experienced problems in managing District 25, which may have been somewhat greater than those of other managers due to the comparatively large size of his territory. No reasonable person would have found the job intolerable. District 25 offered no obstacles unique in the newspaper circulation business; other managers were well acquainted with unpaid bills, circulation overruns and carrier turnover. If District 25 called for more effort from its managers because of its extent and demographics, the demands it posed were hardly unbearable for an employee of Bristow's considerable experience. Bristow's successor did not find District 25 beyond the capacity of a manager familiar with circulation work. Nor did Bristow find the general problems arising in his district to be insoluble; indeed, after he had worked in his new position for a month, they actually

diminished, as might be expected. Finally, Bristow's desire for reinstatement to his position belies the claim that intolerable conditions underlay his resignation.

It is obvious that Bristow's resignation arose from a particular financial dispute with his supervisors, and that at no time did anyone impose intolerable working conditions with the intent to compel him to retire.[4] Deliberate behavior on the part of his employer to force Bristow off the job is not in evidence. While some of Bristow's

[4] Plaintiff's history of alleged promotion denials preceding his resignation contributes nothing to his claim of constructive discharge. Whatever denials he may have experienced entailed no age discrimination, as the jury's verdict established. Any residual embarrassment he may have felt is of no consequence, for "[t]hat occurs any time an employee is not promoted." Federal Reserve Bank, 698 F.2d at 672. A failure to promote is insufficient in itself to result in a constructive discharge. Id.

superiors spoke of early retirement or were even urging his termination, nothing was done to Bristow that would lead a reasonable person to quit. The compromise offered to Bristow, whereby he paid half of the uncollected accounts in his district, was hardly unjust, for plaintiff presented no evidence that any other district managers had been allowed to escape liability when entangled in similar controversies. Whether or not the employer's rules of financial accountability be thought harsh, Bristow was not singled out for any unique treatment. Having to pay a portion of the accounts, for which Bristow did not consider himself responsible, may have marked the culmination of many minor dissatisfactions in the case of this employee. We cannot, however, conclude that he resigned due to anything other than

universal workaday frustrations.[5]

III

We need not resolve any other issues raised on this appeal. Because plaintiff was not constructively discharged, but voluntarily resigned, no adverse employment action has occurred. Consequently, no ADEA suit can be maintained against defendant. The judgment for plaintiff is reversed.

REVERSED.

[5] Though after a week's time Bristow reconsidered his precipitate act, his employer was under no duty of any kind to rehire him, and was entitled in the circumstances to consider his resignation final.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JAMES B. BRISTOW,

Plaintiff,

v. Civil Action
No. 83-193-NN

THE DAILY PRESS, INC.,

Plaintiff.

MEMORANDUM OPINION

This matter is before the Court for the consideration of post-trial motions, following a jury trial held on April 4 to 6, 1984. This action pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, resulted in a jury verdict for the plaintiff with damages assessed at $149,000. The defendant has filed a Motion for Judgment Notwithstanding the Verdict, and alternatively, a Motion for a Remittitur and/or a Motion for a New Trial. The plaintiff has filed a Motion for an Award of Attorney's Fees and Costs. The Court heard

oral argument on these motions on June 22, 1984. The Court has read the briefs of the parties and the motions are now ripe for disposition.

The plaintiff in this action, James B. Bristow, alleged that the defendant, the Daily Press, Inc. ("Daily Press") had discriminated against him by failing to promote him to a position for which he applied and was qualified because of his age. The plaintiff also alleged that he was constructively discharged by the Daily Press because the intolerable working conditions to which he was subjected caused him to request early retirement. The jury found for the defendant on the failure to promote claimant. On the constructive discharge claim the jury found for the plaintiff and awarded him $99,000 in compensatory damages and $50,000 in liquidated damages, after finding that the discrimination against the plaintiff was willful.

I. DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The defendant contends that the evidence presented at trial does not support the verdict. The defendant argues that the plaintiff failed to show that the plaintiff's working conditions were "intolerable," a necessary prerequisit to a finding of constructive discharge. The plaintiff contends that there was sufficient evidence to support the jury's finding that the plaintiff was constructively discharged by the defendant.

In ruling on a motion for judgment notwithstanding the verdict, the Court must consider "the record as a whole and in the light most favorable to the party opposed to the motion." See Wyatt v. Interstate & Ocean Transport Company, 623 F.2d 888, 891 (4th Cir. 1980); Mays v. Pioneer Lumber Corporation, 502 F.2d 106, 107 (4th Cir. 1974), cert. denied, 420 U.S. 927 (1975).

The evidence at trial, viewed in its entirety and in the light most favorable to the plaintiff, was sufficient to support the jury finding that the plaintiff was constructively discharged. There was evidence that the plaintiff, a man in his sixties, was assigned to manage District 25, which was known as a problem district. There was also evidence that the plaintiff was involved in a dispute with his employer over the collection of money. Additionally, the jury had before it the testimony of the plaintiff that he felt that his work conditions were intolerable and that he was in constant fear of being fired. The plaintiff testified further that he submitted his request for early retirement under duress. Finally, there was evidence that the plaintiff attempted to rescind his request for early retirement, but that he was prevented from doing so by the defendant. From this and other evidence, the jury could

reasonably conclude that the plaintiff had been constructively discharged because of his age. Accordingly, the Court DENIES the Motion for a Judgment Notwithstanding the Verdict.

II. DEFENDANT'S MOTION FOR A REMITTITUR AND/OR MOTION FOR A NEW TRIAL

A. Failure to Mitigate Damages

The defendant first argues that the jury incorrectly calculated the amount of "back pay" to which the plaintiff was entitled. Back pay is the amount the plaintiff would have earned from the date of his termination to the date of trial. Specifically, the defendant argues that the plaintiff's failure to mitigate his damages by seeking alternate employment should deprive him of any right to back pay, or should at least be used as an offset against any award of back pay.

In an ADEA case, a plaintiff has a duty to mitigate his damages by seeking alternate available employment with reasonable

diligence. See Cline v. Roadway Express, Inc., 689 F.2d 481, 488 (4th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir.), cert. denied, 454 U.S. 860 (1981). The burden is on the defendant to show that the plaintiff failed to seek alternate available employment. Cline, 689 F.2d 481 n.8.

The defendant failed to show that there was employment available to the plaintiff which he failed to seek. Furthermore, the evidence showed that the plaintiff in fact sought reinstatement as an employee of the defendant, but that the defendant refused to reemploy him. The defendant failed to sustain its burden of showing that the plaintiff failed to mitigate his damages. Accordingly, the Court finds that the jury did not incorrectly fail to take into account the plaintiff's failure to mitigate his damages in calculating back pay.

The evidence disclosed that plaintiff earned in excess of $12,000 a year. He was sixty two years of age when he left the employment of the defendant. Thus he had eight years remaining under which he would be covered by the protective umbrella of the Age Discrimination Act. Certainly simple arithmetic demonstrates that the jury did not act without reason.

While this Court might not have awarded the amount of damages awarded by the jury to the plaintiff, the Court is not convinced that the verdict should be set aside as excessive. The Court is unable to find that the amount of the jury award was a result of passion, sympathy, or prejudice by the members of the jury. The Court is not shocked by the award. Accordingly, the Court declines to set aside the verdict on this ground.

C. Jury Instructions

The defendant argues that the Court erred in instructing the jury that it could award the plaintiff "front pay," or future damages, and liquidated damages. The plaintiff contends that the jury was properly instructed on both elements of damages.

Federal Rule of Civil Procedure 51 states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. R. Civ. P. 51 (emphasis added).

The purpose of Rule 51 is to inform the trial judge of any possible errors in the instructions so that he may have an opportunity to correct them. Haywood v. Ball, 586 F.2d 996, 1000 (4th Cir. 1978), appealed after remand, 634 F.2d 740 (4th Cir. 1980).

The record indicates that counsel for the defendant never objected to any of the Court's instructions to the jury. To the contrary, the record shows that the charge was accepted without objection by both parties. (Tr. 291, 367). The record further indicates that the liquidated damages instruction to which the defendant now objects was in fact an instruction which the defendant had submitted to the Court. (Tr. 416). The parties agreed that the liquidated damages instruction was a correct statement of law. (Tr. 416-17).

Accordingly, the Court holds that by failing to object to the Court's charge to the jury, the defendant waived its right to assign as error the content of that charge.

D. Conclusion

A remittitur "may properly be used to remedy an excessive award of damages made by a properly instructed jury if the award is not attributable to passion or prejudice." Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 206 (4th Cir. 1982), cert. denied, 104 S. Ct. 703 (1984). The Court having found that the jury award was not excessive, it follows that the Motion for a Remittitur should be, and hereby is, DENIED.

A new trial should be granted only if the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice. See, e.g., Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-92 (4th Cir. 1980). The Court has found that

the verdict is supported by the evidence. There is no allegation by the defendant that the verdict was based on false evidence. The Court is convinced that no miscarriage of justice will occur if the verdict is allowed to stand. Accordingly, the Court DENIES the defendant's Motion for a New Trial.

III. MOTION FOR ATTORNEY'S FEES AND COSTS

A. Attorney's Fees

The allowance of attorney's fees is within the discretion of the trial judge "who has close and intimate knowledge of the efforts expended and the value of the service's rendered." Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir.) (quoting United States v. Anglin & Stevenson, 145 F.2d 622, 630 (10th Cir. 1944, cert. denied, 324 U.S. 844 (1945)) cert. denied, 439 U.S. 934 (1978). The starting point for determining the appropriate amount of attorney's fees is to multiply the number of hours reasonably

expended on the case by the reasonable or customary hourly rate. See Allen v. Burke, 690 F.2d 376, 380 (4th Cir. 1982), cert. denied, 103 S. Ct. 1873 (1983). The trial court may then adjust this figure upward or downward in light of the following facts and circumstances:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber v. Kimbrell's, Inc., 577 F.2d at 226 n.28; see Arnold v. Burger King Corp., 719 F.2d 63, 67 (4th Cir.), cert. granted sub nom., Pulliam v. Allen, 103 S. Ct. 1873 (1983); Allen v. Burke, 690 F.2d at 379. The trial Court is "not required to engage in a lengthy discussion concerning what portion of the award is attributable to each factor. See Arnold v. Burger King Corp., 719 F.2d 67 n.4.

The plaintiff has requested the following attorney's fees:

Frederick E. Popovitch	139.27 hrs. at $140/hour
William H. McKinnon	123.20 hrs. at $90/hour
Bernard J. DiMuro	7.8 hrs. at $85/hour
	43.7 hrs. at $100/hour
Charles Rust-Tierney	34.0 hrs. at $65/hour
Law Clerks	7.9 hrs. at $30/hour
TOTAL	$38,065.80

Mr. Popovitch has been admitted to practice law in the State of New Jersey since 1967 and served as lead trial counsel for the plaintiff. Mr. McKinnon is an associate in Mr. Popovitche's firm, and has been admitted to practice in the State of New Jersey since December, 1981. Mr. DiMuro, an associate with the firm of Hirschkop and Grad, has been licensed to practice in the State of Virginia since June, 1979, and served as local counsel in this case. Mr. Rust-Tierney has been admitted to the State of Virginia bar since October, 1982, and is also an associate in the firm of Hirschkop and Grad.

The Court finds that the customary hourly rate for experienced trial attorneys, such as Mr. Popovitch, is $100 per hour. The Court finds that the customary hourly rate for attorneys with 2-1/2 years of experience, such as Mr. McKinnon, is $55 per hour. The Court finds that the customary hourly rate

for attorneys with 5 years of experience, such as Mr. DiMuro, is $75 per hour. The Court finds that the customary hourly rate for attorneys with 1-1/2 years of experience, such as Mr. Rust-Tierney, is $50 per hour.

The Court further finds that this case was a simple statutory case, not requiring any more than average skill. The Court finds that the number of hours which would reasonably be expended by trial counsel in preparing such a case would be 40 hours, the equivalent of one full work week. The Court finds that the number of hours which would reasonably be expended by local counsel in preparing such a case would be 5 hours. Accordingly, the Court determines that the following attorney's fees are reasonable for pretrial preparation:

Mr. Popovitch	40 hours at $100/hr. = $4,000.00
Mr. DiMuro	5 hours at $75/hr. = $375

The Court DENIES the request for attorney's fees for pretrial preparation performed by Mr. McKinnon and for additional attorney's fees for local counsel. Lead counsel, Mr. Popovitch, was unable to attend the first day of trial because of illness. Neither Mr. McKinnon nor local counsel were prepared to go ahead with the trial and the Court was therefore forced to continue the case after jury selection until the next day.

The Court will allow attorney's fees for trial time for Mr. Popovitch and for local counsel as follows:

Mr. Popovitch	18 hours at $100/hr. = $1,800.00
Mr. DiMuro	3 hours at $75/hr. = $225.00
Mr. Rust-Tierney	15 hours at $50/hr. = $750.00

The hourly rate allowed is set in accordance with the Court's determination of local rates charged by lawyers of similar age, experience

and ability. The Court is of the opinion that the presence of Mr. McKinnon during the trial was unnecessary as Mr. Popovitch had local counsel to assist him with the preparation and trial of this case. It was totally unnecessary to have three attorneys present during the trial of this simple statutory case, and accordingly, the Court will allow fees for the presence of lead counsel and local counsel only.

The Court finds that the number of hours which would be reasonably expended by trial counsel in performing post-trial work on motions would be 16 hours, the equivalent of two full work days. The Court further finds that local counsel would reasonably expend 1 hour on post-trial work. The Court will therefore allow the following fees for post-trial work:

Mr. Popovitch	16 hours at $100/hr. = $1,600.00
Mr. DiMuro	1 hour at $75/hr. = $75.00

The Court will now consider whether these figures should be adjusted upward or downward in light of the Barber factors. The Court has already addressed factors 1, 2, 3, 5, 8 and 9. The plaintiff concedes that factors 7, 10 and 11 are inapplicable. The Court will therefore address the remaining factors.

With regard to the fourth factor, the Court is unconvinced that counsel were forced to forego other business opportunities as a result of taking on this simple statutory case. Likewise, the Court is unconvinced that counsel took on this case thinking he would lose it, and accordingly the sixth factor is inapplicable. With regard to factor 12, the Court is familiar with attorney's fees awards in similar cases, and believes the fees in this case are consistent with those in similar cases. Accordingly, the Court DECLINES to make any adjustments in the fees previously enumerated.

In summary, the Court GRANTS the plaintiff the following attorney's fees:

Mr. Popovitch	74 hours at $100/hr.= $7,400.00
Mr. DiMuro	9 hours at $75/hr. = $675.00
Mr. Rust-Tierney	15 hours at $50/hr. = $750.00
TOTAL	$8,825.00

B. Costs

The plaintiff has requested an award of costs in the amount of $2,807.97. The Court has reviewed the itemized costs submitted by the plaintiff. The Court has found these costs to be inadequately explained in many instances. For example; phone charges are listed simply as "telephone," without explanation of to whom the call was placed and for what purpose. Accordingly, the Court has determined that a reasonable award of costs in this case would be $1,500.00 and GRANTS the plaintiff an award of costs in that amount.

C. Conclusion

The Clerk is DIRECTED to enter judgment in favor of the plaintiff and against the defendant for counsel fees in the sum of $8,825.00 and costs in the sum of $1,500.00.

IT IS SO ORDERED.

The Clerk shall mail a copy of this Memorandum Opinion to counsel of record for each of the parties in the case.

/s/ J. CALVITT CLARKE
United States District Judge

Norfolk, Virginia

August 21, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2021

JAMES B. BRISTOW, Appellee,

versus

THE DAILY PRESS, INC., Appellant.

No. 84-2039

JAMES B. BRISTOW, Appellant,

versus

THE DAILY PRESS, INC. Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Newport News. J. Calvitt Clarke, District Judge.

The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc, motion for leave to file out of time, motion for leave to file with addenda, and motion for a stay of the mandate pending the court's decision on the petition for rehearing were submitted to this Court. As no judge requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

IT IS FURTHER ORDERED that the motions for leave to file out of time, for leave to file with addenda, and for stay of the mandate pending the court's decision on the petition for rehearing are granted.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Russell and Judge Knapp.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX D

29 U.S.C. § 621. Congressional statement of findings and purpose.

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 623. Prohibition of age discrimination.

(a) **Employer practices.** It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act [29 USCS §§ 621 et seq.].

29 U.S.C.§626. Recordkeeping, investigation, and enforcement.

(b) **Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion.**

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS §§ 211(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS § 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 216, 217) [29 USCS §§ 216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or

practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) **Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.**

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) **Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion.**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) **Statute of limitations; reliance in future on administrative rulings, etc.; tolling.**

(1) Sections 6 and 10 of the Portal-to-Portal Act of 1947 [29 USCS §§ 255 and 259] shall apply to actions under this Act.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 [29 USCS § 255] shall be tolled, but in no event for a period in excess of one year.

29 U.S.C. § 630. Definitions.

For the purposes of this Act [29 USCS §§ 621 et seq.]--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a state or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or

other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term " industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

29 U.S.C. § 631. Age limits.

(a) **Individuals at least 40 but less than 70 years of age.** The prohibitions in this Act [29 USCS §§ 621 et seq.] shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Supreme Court, U.S.
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CLERK

(2)

No. 85-1171

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

JAMES B. BRISTOW,

Petitioner,

v.

THE DAILY PRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT THE DAILY PRESS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS BELOW CORRECTLY APPLIED THE UNANIMOUS REQUIREMENT AMONG THE FEDERAL CIRCUITS THAT IN EACH CONSTRUCTIVE DISCHARGE CASE A PLAINTIFF MUST PROVE THE EXISTENCE OF WORKING CONDITIONS SO INTOLERABLE THAT A REASONABLE PERSON, SIMILARLY SITUATED, WOULD HAVE RESIGNED.

II. WHETHER THE "CLEARLY ERRONEOUS" STANDARD OF FED. R. CIV. P. 52(a), WHICH APPLIES ONLY TO "ACTIONS TRIED UPON FACTS WITHOUT A JURY," SHOULD HAVE BEEN APPLIED BY THE COURT OF APPEALS IN REVIEWING THE JURY'S VERDICT IN THIS CASE.

III. WHETHER THIS COURT SHOULD REVIEW AN ISSUE WHICH WAS NEVER RAISED IN THE DISTRICT COURT AND WAS NEVER RAISED IN THE COURT OF APPEALS.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

No. 85-1171

JAMES B. BRISTOW,

Petitioner,

v.

THE DAILY PRESS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT THE DAILY PRESS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Respondent, The Daily Press, Inc. (Daily Press), does not rely upon the Statement of the Case contained in the Petition for Certiorari and submits the following counterstatement.

A. PROCEDURAL HISTORY

Petitioner James B. Bristow brought the above-captioned action under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.S. Sections 621-634, (ADEA), alleging two causes of action. He first alleged that the Daily Press had discriminated against

him in failing to promote him to certain higher level positions for which he had allegedly applied and for which he was allegedly qualified. Petitioner's second cause of action alleged that his request for early retirement, while appearing voluntary, was actually a forced resignation and, therefore, claimed that he was constructively discharged from Daily Press' employ due to the allegedly intolerable working conditions deliberately imposed upon him by his employer.

Petitioner's claims against Daily Press were tried before a jury in the U.S. District Court for the Eastern District of Virginia, Newport News Division, beginning April 4, 1984. The jury rendered a verdict in favor of the Daily Press on the first cause of action. The jury found in favor of Petitioner on the constructive discharge claim and awarded $99,000 in general damages and $50,000 in liquidated damages.

Following the entry of judgment, counsel for the parties timely filed post trial motions and appropriate oppositions thereto. The Daily Press moved the Court to enter judgment n.o.v. or, alternatively, for a remittitur and/or a new trial.

In its Memorandum Opinion dated August 2, 1984, the Court directed the Clerk to enter judgment in favor of Bristow and against the Daily Press for counsel fees in the sum of $8,825.00 and costs in the sum of $1,500. Additionally, in said Memorandum Opinion, the Court denied Daily Press' Motion for Judgment N.O.V. Alternatively. Motion for Remittitur and/or a New Trial.

The principal argument advanced by Daily Press in its Motion for Judgment N.O.V. focused upon whether the facts, as developed at trial, met the criteria for constructive discharge under applicable law. Various other substantive issues involving damages and jury instructions were also raised. Petitioner did not raise any procedural objections to

the Motion for Judgment N.O.V. and did not allege any deficiencies in Respondent's two motions for directed verdict.[1]

The parties filed timely cross-appeals in the Fourth Circuit. Again the primary arguments centered upon the issues of constructive discharge, excessive damages, and attorneys fees. Again Petitioner failed to raise procedural issues involving Respondent's Motion for Judgment N.O.V., and again, did not allege that the motions for directed verdict were insufficient.

In its opinion dated August 22, 1984, the Fourth Circuit reversed the judgment in favor of Bristow holding that, even construing the evidence in the light most favorable to the Petitioner, the constructive discharge test was not met. Petitioner was granted an enlargement of time to Petition for Rehearing en banc. Said Petition was denied on October 29, 1985.

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[1] The Petitioner made the following argument in its Opposition to the Respondent's Motion for Judgment N.O.V.:

> "C. *Judgment Notwithstanding the Verdict:*
>
> A Judgment notwithstanding the verdict is not unlike a motion for a directed verdict. In deciding whether to grant judgment n.o.v., the trial court must consider all evidence and inferences in the light most favorable to the non-moving party. In other words, if the jury could reasonably draw the inferences necessary to the non-moving party's case, or if the moving and non-moving parties's inferences are equally likely, then a judgment n.o.v. would not be entered. *Moore v. Carolina Power & Light Co.*, 537 F.2d 1252 (4th Cir. 1976). [*cert. denied*, 429 U.S. 1001 (1977)]
>
> Considering all of the evidence and inferences in the light most favorable to plaintiff, it simply cannot be said that the jury's verdict was erroneous."

Plaintiff's Opposition to Motion for Judgment N.O.V. at 21.

B. STATEMENT OF FACTS

Respondent, The Daily Press, Inc., is a closely-held corporation which publishes morning and afternoon newspapers of daily circulation. The newspapers published are *The Daily Press* and *The Times Herald*, respectively. These newspapers are circulated throughout the Virginia peninsula.

Respondent hired Petitioner, James B. Bristow, in February 1965. Petitioner performed a variety of functions, all within the circulation department during his fifteen years as an employee of Respondent's newspapers. On October 15, 1980, Daniel Cruey, then assistant circulation director, promoted Petitioner to manager of circulation District 25. Petitioner's duties were identical to other district managers. He supervised newspaper circulation, collections and billing for a number of homes and businesses to which the newspaper was delivered. Each circulation district comprised a group of subscribers within a particular geographic area. District 25 encompassed one of the larger geographic areas and included an economic cross-section of newspaper subscribers. There were fifty-seven carriers in the district including fifty-five home delivery boys and two motor routes. (TR. 85). Supervising Bristow at that time were division manager Jean Burdick, his immediate supervisor; Daniel Cruey, assistant circulation director; and John Goodwyn, circulation director. Bristow resigned as District 25 manager in September of 1981.

Prior to his appointment as District 25 manager, Petitioner worked as a "swing man" who substituted for other district managers throughout the newspapers' circulation districts as needed. He began his duties in July 1979 after the appointment of the new single copy sales manager, Jim Casey. Petitioner determined he would rather be "swing

man" district manager rather than Mr. Casey's assistant.[2] Petitioner remained in the "swing man" district manager position for a period of fifteen months until his appointment as District 25 manager in October of 1980.

Upon assuming his duties as District 25 manager, Petitioner encountered the usual problems associated with management of circulation districts. In particular, collection problems in the two low-income areas and increased gasoline prices for two motor carrier routes caused carrier turnover. (TR 91). Additionally, younger carriers occasionally failed to update circulation lists causing small circulation overruns and attendant collection problems. (TR 93, 94) Petitioner testified at trial that he was able to stabilize these problems within three or four weeks of his arrival at circulation District 25. (TR 90). Moreover, both Petitioner's predecessor, H. Nelson Salway, (TR 170) and successor, Robert H. Gray, (TR 191) experienced similar problems with District 25 and concluded they were not unique to that district; other districts they had managed presented similar problems.[3]

Approximately ten months after his assignment to District 25, Petitioner was routinely audited and blamed for several outstanding accounts. Petitioner and all other district managers personally paid collection shortfalls caused

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[2] Petitioner now asserts it was 1980 when circulation director Goodwyn "led him to believe (that either assistant circulation director or single copy sales manager) would be his." (Petition p. 6). In fact, Bristow testified at trial that his conversations with Goodwyn concerning these jobs occurred in July 1979. (TR 60, 61, 63). Moreover, Respondent employed assistant circulation director Cruey in August of 1979. (TR 259). Goodwyn informed Petitioner of this fact over the July 4, 1979 holiday weekend. (TR 61).

[3] Petitioner implies District 25 was unmanageable since his predecessor, Salway, suffered a nervous breakdown. (Petition p. 8). Salway chose to return to District 25 rather than manage another district in October 1979 (TR 171). Gray encountered only minor problems when he succeeded Petitioner (TR 187).

by circulation overruns within their districts to the extent that carriers did not pay for newspapers delivered to them. Despite this company-wide employment policy, Bristow did not believe he was responsible for the shortfall discovered during the audit. Throughout his employment, Petitioner experienced problems in accounting for sums he collected on behalf of The Daily Press. In part, this was due to his practice of commingling these sums with his own funds. (TR 161). His unsatisfactory accounting procedures were known to his supervisors at The Daily Press (TR 239, 259), and on numerous occasions he was required to pay deficiencies with his own funds. (TR 263-64).

On September 9, 1981, Petitioner was called to a meeting with Goodwyn, Cruey, and Burdick and presented with a list of uncollected accounts totalling $562.34. Although Petitioner's job performance was reviewed comprehensively and criticized in some respects, his supervisors did not threaten to fire him. Despite the work-rule requiring reimbursement for uncollected sums by district managers, Cruey suggested that Petitioner pay only one-half of the total sum. Nonetheless, Bristow remained convinced that he wasn't obligated to pay the sum but finally tendered it after a request from Burdick. No further action was taken against Bristow after the meeting. In fact, a September 9 summary memorandum written by circulation head Goodwyn soundly criticized division manager Burdick rather than Bristow for the problems in District 25. (TR 240).

Despite having heard nothing further from either Goodwyn or Cruey since the meeting, Petitioner voluntarily resigned several days later after concluding that management wanted him out. Petitioner personally delivered his resignation to Respondent's president, William Van Buren, Jr. Mr. Van Buren informed Petitioner that his request was "short notice," but he would attempt to honor it. (TR 111,

318). Van Buren then expedited the request and polled the Board of Directors by telephone who voted to accept the resignation. (TR 317-18). After this action, Petitioner changed his mind and requested he be allowed to withdraw his resignation. By that time Petitioner was no longer employed with the Company and the pension manager had been so notified. Respondent chose not to rehire Petitioner.

C. THE PARTIES

James B. Bristow, Petitioner.

The Daily Press, Inc. is a closely-held corporation which owns and operates two newspapers circulated throughout the Virginia peninsula including the cities of Newport News, Hampton, Norfolk and Williamsburg. In addition, the company owns two cable distribution network subsidiaries, Piedmont Cablevision Company and Newport News Cablevision Company. Finally, the corporation has an ownership interest in the Aberdeen Company which owns a shopping mall in Hampton, Virginia.

REASONS FOR DENYING THE WRIT
SUMMARY OF ARGUMENT

The Federal Circuits all require that plaintiff must establish working conditions which a reasonable person would find intolerable in order to recover for constructive discharge. There is no conflict whatsoever on this point. The Fourth Circuit unequivocally found that the plaintiff totally failed to establish intolerable working conditions. It is clear that petitioner has failed to establish a conflict among the circuits with respect to the critical central issue in this case.

Petitioner additionally argues that the Fourth Circuit and others require an additional showing of subjective intent on the part of an employer to impose intolerable working conditions in a constructive discharge case. Petitioner's

assertion is not only irrelevant to the disposition of this case, it is inaccurate. Petitioner's alleged conflict among the Federal Circuits is primarily a semantic difference.

There is no authority whatever for Petitioner's assertion that the standard of review embodied in Rule 52(a) applies to a case tried to a jury.

Finally, this court should not review an issue raised for the first time in a Petition for certiorari.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD RECOGNIZED BY ALL FEDERAL CIRCUITS IN FINDING THAT PLAINTIFF FAILED TO PROVE INTOLERABLE WORKING CONDITIONS WHICH WOULD CAUSE A REASONABLE PERSON TO RESIGN.

The Federal Circuits uniformly require a plaintiff who would prove constructive discharge to demonstrate that a "reasonable person" in the plaintiff's shoes would have been compelled to resign as a result of intolerable working conditions. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984); *Penna v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983); *Lojek v. Thomas*, 716 F.2d 675, 681 (9th Cir. 1983); *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981); *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981); *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Alicia Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

The Fourth Circuit applied this universally accepted standard and concluded that petitioner had failed to prove the principle element of his case:

> At most Bristow demonstrated that he experienced problems in managing District 25, which may have been somewhat greater than those of other managers due to the comparatively large size of his territory. No reasonable person would have found his job intolerable.

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

Petitioner suggests that an apparent conflict in the Circuits on the requisite elements of constructive discharge warrants this Court's review of the Court of Appeals' decision in this case. Plaintiff's assertion of this premise badly misses the mark since consideration of the question of constructive discharge solely from the perspective of a reasonable employee would not alter the result in this case.

The Court of Appeals clearly held that Petitioner failed to establish *either* element of constructive discharge. Plaintiff failed to establish intolerable conditions as required by all Circuits. Plaintiff also failed to prove the secondary issue of subjective intent.

The objective reasonable person standard of proof of intolerable working conditions is an essential element in each case of constructive discharge. The law will not permit a finding of constructive discharge based upon the subjective perceptions of a particular employee since this would subject employers to liability for discrimination based upon the whim of unusually sensitive employees. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

As the Fourth Circuit noted in this case:

> The employment discrimination laws require as an absolute precondition to suit that some adverse employment action has occurred. They cannot be

> transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quiting.

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

Absent disparate treatment of a protected employee class, where an employer treats each employee substantially the same through the consistent application of standard work rules, there is no basis for a claim of discrimination. *Neal v. Dillon*, 534 F. Supp. 1381, 1390 (E.D.N.Y. 1982), *aff'd.* 714 F.2d 116 (2d Cir. 1983). An employee is not entitled to claim constructive discharge because he resigns over the application of a particular work rule. Yet the record unequivocally demonstrates Petitioner resigned for precisely this reason. He was dissatisfied over Respondent's requirement that district managers personally reimburse the company for circulation overruns caused by their carriers' failure to monitor their circulation lists properly, or to collect sufficient sums from their subscribers. Plaintiff introduced not a scintilla of evidence which demonstrated disparate treatment from that of any other district manager. In fact, Respondent levied a lessor penalty on Petitioner by requiring him to reimburse the paper for only one-half of the uncollectible circulation debts within his district. (TR 110).

Petitioner's attempts to characterize his employment conditions as unusual, discriminatory or intolerable, are unpersuasive. District 25, although larger geographically than some other districts, was managed satisfactorily by two other district managers before and after Petitioner resigned. (TR 170, 191). One presumably construed the district a challenge which could lead to job advancement. (TR 171). Moreover, Petitioner's attempt now to manufacture a conspiracy of denied promotions in which Respondent "sought to build Bristow up and then let him down" is without any

support in the record. (Petition p. 14). Respondent's denial of Petitioner's supposed applications for promotion to single copy sales manager and assistant circulation director was uncorroborated at trial; the jury found his representations to this effect unpersuasive. Moreover, any alleged conversations were concluded, according to Petitioner, over fourteen months prior to his appointment as District 25 manager and over two years prior to his resignation.[4]

In addition, Petitioner's other allegations of discrimination are unsupported. There is no evidence that Petitioner's transfer to District 25 was abrupt given his length of duty as swing man. No connection exists between the absence of a carrier audit eleven months prior to his resignation and the $532.34 collection shortfall over which he resigned.

The decisions of the Federal Circuits which have reviewed constructive discharge cases on appeal do not reflect a "schism" as to what actions of an employer will give rise to a constructive discharge. Rather, they reflect the variations manifested by the unique work histories which the appellate courts were called upon to review. Petitioner argues that there is a conflict among the Circuits with respect to the requirement of an additional showing of "subjective intent" on the part of the employer to impose intolerable conditions. Petitioner's assertion is not only irrelevent to the disposition of this petition, it is also inaccurate.[5]

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[4] Any residual embarrassment he may have felt is of no consequence, for "[t]hat occurs any time an employee is not promoted." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 104 S.Ct. 2794 (1984).

[5] The Court below considered the secondary issue of employer intent only in passing and devoted only two sentences to the issue in its five page opinion. *Bristow*, 770 F.2d at 1251. The Court, as with other opinions in other Federal circuits, focused instead upon the primary requirement that Petitioner failed to demonstrate intolerable working conditions which would

Petitioner states that the requirement of "subjective intent" is improper and that a finding regarding the objective reasonable person standard should be all that is required. This ignores the unequivocal language of the Court below that subjective "[i]ntent may be inferred through circumstantial evidence." *Bristow*, 770 F.2d at 1255, *citing, Holsey v. Armor & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1395 (1985). Thus, it is clear that the Fourth Circuit permits proof of *subjective* intent through an *objective* showing of "circumstantial evidence," including the severity of the working conditions and the failure of an employer to correct untenable working conditions. See *Holsey*, 743 F.2d at 209.

It is apparent that the conflict which Petitioner seeks to have resolved is little more than a semantic distinction without a difference. Where subjective intent may be proven by "circumstantial evidence" of working conditions and failure to correct those conditions, the plaintiff's burden of proof is virtually identical.

II. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW.

A. The "Clearly Erroneous" Standard of Rule 52(a) Does Not Apply to a Case Tried to a Jury.

Petitioner incorrectly asserts that the Circuit Court should have applied the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). The prescription of Rule 52(a) that findings of a District Judge may be put aside if "clearly erroneous" applies only to cases actually *tried* to a District

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lead a reasonable person, similarly situated, to resign. See *Penna v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). ("The Retreat's treatment of Mrs. Penna cannot even remotely be described as intolerable.").

Judge and is totally inapplicable in jury cases. The rule on its face, and as applied by the Courts makes this clear.

Rule 52(a) unambiguously states that it applies to "all actions *tried upon facts without a jury* . . . ." (Emphasis added). This Rule has no applicability to a case tried to a jury.

In *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961), the Eighth Circuit held:

> In any event, we are satisfied that Rule 52 applies only to findings of fact in actions tried to a court without a jury, and possibly to situations where the jury is serving only in an advisory capacity.

Id. at 618.

There is no authority whatever for the proposition that Rule 52(a) applies to a general verdict by a jury. Accordingly there is no basis for review by this Court.

B. The Court of Appeals Applied the Correct Standard of Review in Construing the Evidence in the Light Most Favorable to the Plaintiff.

The Court of Appeals correctly applied the standard of review of a jury verdict on denial of a motion for judgment n.o.v. in a Federal District Court:

> Even construing the evidence in the light most favorable to the nonmoving party, as we are required to do in reviewing a jury verdict on a motion for judgment n.o.v., *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980), the constructive discharge test was not satisfied here. For judgment n.o.v. to be denied, there had to exist "substantial evidence" upon which a jury could reasonably return a verdict for Bristow.

> *Wyatt*, 623 F.2d at 891. We are convinced that such evidence is lacking.

770 F.2d at 1255.

Every circuit which has considered the issue has applied the same standard of review set forth by the Court below. It is clear that where plaintiff receives a jury verdict in his favor and the court denies defendant's motion for judgment notwithstanding the verdict, the appellate court must apply the same standard as the trial court, that is, the appellate court must view the evidence "in the light most favorable to the plaintiff." *Kademenos v. Equitable Life Assurance Soc.*, 513 F.2d 1073 (3rd Cir. 1975); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 423 U.S. 913 (1976); *Sandoval v. U.S. Smelting, Refining & Mining Co.*, 544 F.2d 463 (10th Cir. 1976); *Houser v. Sears Roebuck & Co.*, 627 F.2d 756 (5th Cir. 1980).

The Fourth Circuit applied the correct standard of review in this case. Petitioner's claim that the "clearly erroneous" standard of Rule 52(a) should have been applied is utterly without merit.

III. THE PLAINTIFF NEVER RASIED THE ISSUE OF ALLEGED DEFICIENCIES IN DEFENDANT'S MOTIONS FOR DIRECTED VERDICT IN THE DISTRICT COURT, OR IN THE FOURTH CIRCUIT, AND CANNOT RAISE THE ISSUE HERE FOR THE FIRST TIME.

Petitioner argues for the first time that Defendant did not properly move for a directed verdict on the issue of constructive discharge based on age discrimination.[6] Peti-

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[6] While Petitioner designates this issue as one of three Questions Presented for Review (Petition p. ii), the only mention of the issue appears in a footnote (Petition p. 28).

tioner failed to raise this issue in his Opposition to Respondent's Motion for Judgment N.O.V., (see p. 3, *supra*) and failed to raise the issue on appeal to the Fourth Circuit. Petitioner is clearly barred from raising the issue for the first time in a Petition for Certiorari.

This Court has held that it will not review an issue which was not raised in District Court. *Blum v. Stenson*, ____ U.S. ____, 79 L.Ed.2d 891, 897, n.5 (1984).

This Court has similarly held that it will not review an issue which was not raised before the Circuit Court. *County of Oneida v. Oneida Indian Nation*, ____ U.S. ____, 84 L.Ed.2d 169, 185 (1985).

Because the Petitioner failed to raise this issue in *either* of the courts below, this Court should decline to consider the issue.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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